No. 79-252

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL ISAAC LASKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 600 F. 2d 765.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1979. The petition for a writ of certiorari was filed on August 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government was collaterally estopped by a prior administrative decision from prosecuting petitioner.

2. Whether the indictment should have been dismissed because the government withheld the administrative decision from the grand jury.

3. Whether the search warrant was supported by probable cause.

4. Whether certain letters were properly admitted into evidence.

5. Whether the government's questioning of two witnesses deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 23 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to five years' imprisonment on each count, the sentences to run concurrently, and fined $15,000. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner, the president of Space Advertising, Inc., and two others used the mails in furtherance of a plan to obtain money through a false advertising scheme. The scheme realized over two million dollars and victimized businesses and, to a lesser extent, schools, hospitals and government agencies (12 Tr. 2181).[1] The scheme assumed two forms. Petitioner (working with and through associates) placed advertisements for customers in what petitioner represented to be widely distributed publications supporting disadvantaged minorities. The "publications" were in

[1]"Tr." refers to the trial transcript, and the number proceding Tr. refers to the volume. "C.T." refers to the clerk's transcript which constituted the record on appeal.

fact either throwaway circulars or a "newspaper" published by Space Advertising with a circulation limited to the parties who advertised in it (2 Tr. 148; 4 Tr. 670; 5 Tr. 771, 807; 6 Tr. 1011; 10 Tr. 1781-1783). On other occasions, petitioner billed businesses for publishing advertisements that had never been authorized, or for advertisements neither authorized nor published (3 Tr. 356-357; 4 Tr. 633-635, 645, 653, 656; 6 Tr. 1005-1006). Thousands of such billings were generated during a period when Space Advertising had virtually no sales force (8 Tr. 1320, 1328).

ARGUMENT

1. On August 29, 1975, the Consumer Protection Office of the United States Postal Service filed a civil complaint against Space Advertising and several of its corporate alter egos seeking suspension of mail service for violations of 39 U.S.C. 3005[2] (C.T. 47-50). An administrative law judge dismissed the complaint after a hearing (C.T. 55-56). Petitioner contends (Pet. 6-14) that the administrative law judge's determination served to collaterally estop the government from prosecuting this case.

Assuming *arguendo* that a criminal prosecution may be collaterally estopped by a favorable prior administrative determination,[3] petitioner's prosecution was not collaterally estopped here. To invoke the doctrine of collateral estoppel a defendant must show, *inter alia*, that

[2]39 U.S.C. 3005 provides for the suspension of mail service "[u]pon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations * * *."

[3]A civil action may be collaterally estopped by a prior administrative determination. See *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966).

the precise issue to be resolved was decided in his favor in the prior action. See *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Petitioner has not made—and indeed cannot make—such a showing.

In the district court, the only support for petitioner's estoppel claim was a copy of the administrative law judge's decision dismissing the complaint. After petitioner failed to respond to repeated requests by the court for record citations showing what issues had been raised in the postal hearing (Pet. App. A-5 to A-6), the trial judge denied petitioner's motion to dismiss the indictment, ruling that he had failed to introduce sufficient evidence of the administrative proceeding to enable the district court "to pinpoint the exact issues previously litigated" (Pet. App. A-6). That determination was affirmed on appeal (Pet. App. A-7).

Petitioner alleges here (Pet. 7) that he did not submit record citations to the district court showing the identity of issues because he was unable to obtain from the government a copy of the record of the administrative proceeding. However, even now, having obtained a copy of the record, petitioner neglects to specify precisely what alleged acts of Space Advertising were the subject of the administrative hearing. The claim of estoppel, like any other affirmative defense, is the defendant's to make. Since petitioner has failed to meet his burden of establishing that there was an identity of issues in the two proceedings, his claim of collateral estoppel was properly rejected. See *Turley* v. *Wyrick*, 554 F. 2d 840, 842 n.2 (8th Cir. 1977), cert. denied, 434 U.S. 1033 (1978); *United States* v. *Feinberg*, 383 F. 2d 60, 71 (2d Cir. 1967).

In any event, there was no identity of issues warranting application of the doctrine. The Postal Service's complaint against Space Advertising was based on eleven

alleged acts of mail fraud involving the billing of customers for unauthorized placements (see transcript of administrative proceeding against Space Advertising, Inc., lodged with the court of appeals, at 20-39, 46-82, 88-96, 119-125, 130-150, 173-182, 184-187, 224-228, 237-243, 258-262, 362-369), and the administrative law judge determined that the billings "were either the result of error or the unauthorized actions of employees of [Space Advertising] * * *" (C.T. 55). Petitioner's criminal prosecution, on the other hand, was based on 48 different and separate acts of mail fraud (C.T. 1-9).[4] Accordingly, the doctrine of collateral estoppel is simply inapplicable here.

2. Petitioner contends (Pet. 17-20) that because the government withheld the outcome of the administrative hearing from the grand jury it concealed "exculpatory evidence" and thus denied him due process of law. This claim is neither legally nor factually correct. The grand jury was, in fact, apprised of the outcome of the hearing. Testifying before the grand jury, petitioner's lawyer indicated no fewer than three times that the Postal Service had lost its case against Space Advertising (G.J. Tr. of March 25, 1976, at 7, 17, 27; see also *id.* at 22). Moreover, even if the grand jury had not been apprised of the outcome of the hearing, it is by no means clear that the administrative law judge's decision was exculpatory, since the acts upon which the grand jury based its indictment were not litigated in the Postal Service proceeding.

In any event, it is well settled that a defendant has no right to have exculpatory evidence presented to a grand jury. See *United States* v. *Ruyle*, 524 F. 2d 1133, 1136 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976). See also

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[4]Twenty-five of the counts were dropped from the indictment during trial. Petitioner was convicted on all of the remaining 23 counts.

United States v. *Brown*, 574 F. 2d 1274, 1276 (5th Cir. 1978) (no right to have evidence presented to grand jury that would undermine witness's credibility); *United States* v. *Smith*, 552 F. 2d 257 (8th Cir. 1977) (same). As this Court stated in *Costello* v. *United States*, 350 U.S. 359, 363 (1956), "[a]n indictment returned by a legally constituted and unbiased grand jury * * *, if valid on its face, is enough to call for trial of the charge on the merits." See also *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Lawn* v. *United States*, 355 U.S. 339, 349-350 (1958). Since the indictment in this case was facially valid and there is no claim of jury bias, petitioner's claim provides no basis for dismissal.

3. Petitioner contends (Pet. 21-22) that the government's affidavit was insufficient to support a warrant to search the offices of Space Advertising because the affidavit failed to provide reliable information that a crime had been committed. This claim is insubstantial.

The affidavit (C.T. 63-67) stated that Space Advertising was in the business of billing corporations for unauthorized advertisements and obtaining authorization for advertisements under false pretenses. The allegations were based on interviews with five ex-employees,[5] two of whom described Space Advertising's deceptive practices in great detail, and on numerous complaint letters from victim-corporations, supported by invoices. Clearly the magistrate was justified in finding credible this abundantly detailed information. The statements of the ex-employees and complaining corporations were mutually corroborative and, given their detail, carried their own indicia of reliability. See, *e.g.*, *United States* v. *Swihart*,

[5]Two of the ex-employees were interviewed by an agent other than affiant.

554 F. 2d 264, 268-269 (6th Cir. 1977); *United States* v. *Banks*, 539 F. 2d 14, 17 (9th Cir.), cert. denied, 429 U.S. 1024 (1976); *United States* v. *Mahler*, 442 F. 2d 1172, 1174-1175 (9th Cir. 1971).

4. Petitioner also contends (Pet. 15-16) that the complaint letters should not have been admitted into evidence. He does not argue that the letters were inadmissible hearsay—a position unavailable to him since the letters were not offered to prove the truth of their contents but to establish that petitioner was aware of his company's deceptive business practices (12 Tr. 2263-2264). See Fed. R. Evid. 801(c). Rather, he claims that the letters should have been excluded under Fed. R. Evid. 403 because their prejudicial effect substantially outweighed their probative value.

Rule 403 commits to the trial court's discretion judgments involving the probative value and possible prejudicial impact of proffered evidence. Here, the probative value of the complaint letters was substantial. An essential element of the crime charged is the existence of a "scheme" to defraud. Petitioner's awareness of his company's deceptive business practices and his failure to put a stop to them is strong evidence that the challenged activities constituted a deliberate scheme rather than mere negligent business practice. Since the letters clearly established petitioner's awareness of the deceptive practices, they were key in establishing his criminal liability. See *Phillips* v. *United States*, 356 F. 2d 297, 301 (9th Cir. 1965).[6]

[6]The record shows that the letters were kept in petitioner's office, that he paid particular attention to any letter that threatened to inform the authorities, and that the letters were attached to files sent to employees for collection purposes (Pet. App. A-8).

On the other hand, any prejudicial effect of the letters was minimized by the fact that the court twice instructed the jury—once when the letters were admitted into evidence (12 Tr. 2263-2264) and again when the jury was charged (C.T. 324)—that the letters were to be considered solely on the question of notice *vel non*. Under these circumstances, the court clearly did not abuse its discretion.

5. Petitioner contends (Pet. 23-27) that questions asked by the government of two witnesses were so improper as to compel reversal. This claim is without merit.

a. On redirect examination, the government elicited a statement from David Roberts, a former Space Advertising employee who participated in the scheme and testified as a government witness, that in setting up his own business he had used Space Advertising as a model (7 Tr. 1175-1176). On cross-examination defense counsel had opened the door to this line of inquiry by questioning Roberts about his business practices (6 Tr. 1084-1085; 7 Tr. 1118-1121). Petitioner contends that this testimony was irrelevant. However, as the court of appeals concluded (Pet. App. A-9), it contributed to establishing Roberts' familiarity with the business practices of Space Advertising, about which he testified at length.

Petitioner also contends that once the government elicited from Roberts testimony that he modeled his business after Space Advertising, Roberts' earlier testimony that he had pled guilty on charges arising out of his own business practices (adduced because of its potential bearing upon Roberts' credibility) was somehow elevated to evidence of petitioner's guilt here. This claim is frivolous. Roberts also pleaded guilty to one of the counts in the instant indictment arising out of his conduct while employed at Space Advertising. If that fact can be placed

before the jury without offending the Constitution, surely there was no infirmity in apprising the jury of Roberts' plea in an unrelated case.

b. Petitioner also objects to a question asked of defense witness Joseph A. Capalbo, the law partner of petitioner's attorney. Capalbo had recorded a pretrial conversation with government witness David Bayless without disclosing to Bayless that he was doing so.[7] The court advised the government that any exploration into violations of state law arguably committed by Capalbo in his taping would not be allowed. Nevertheless, on cross-examination of prosecutor asked; " 'But you know it's a violation of California law not to [advise Bayless that the conversation was being taped]?' " (Pet. App. A-9). Petitioner quickly interposed an objection, which the court sustained. While it was of course improper for the prosecutor to breach the court's directive, that breach was, as the court of appeals found (*ibid.*), harmless insofar as petitioner's right to a fair trial is concerned. The court took immediate corrective action. The question was not answered. The question itself was not inflammatory and, standing alone, could have had little bearing on Capalbo's credibility. Moreover, the evidence of petitioner's guilt, spread out over 21 volumes of transcript, was overwhelming.

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[7]The defense alleged at trial that Bayless told Capalbo that he would change his testimony in exchange for money.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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